IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

FRIDAY, THE 2ND NOVEMBER 2007 / 11TH KARTHIKA 1929

OP.No. 7403 of 2003(F)

PETITIONER:

O.T.ENASU, 31/20B, NILAMPUR HOUSE,
AMBELIPPADAM P.O., VYTTILA, COCHIN 682 019.

BY ADV. SRI.A.M.SHAFFIQUE,
SRI.E.K.NANDAKUMAR,
SRI.A.K.JAYASANKAR NAMBIAR,
SMT.PRIYA MAHESH,
SMT.PRIYA MANJOORAN,
SRI.K.B.SAJESH.

RESPONDENTS:
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1. **THE UNION OF INDIA, REPRESENTED BY**
   THE SECRETARY, MINISTRY OF FINANCE
   (DEPARTMENT OF REVENUE), GOVERNMENT OF INDIA,
   NORTH BLOCK, NEW DELHI - 110 001.

2. **THE CUSTOMS EXCISE & GOLD (CONTROL)**
   APPELLATE TRIBUNAL, SOUTH ZONAL BENCH,
   1ST FLOOR, W.T.C. BUILDING, FKCCI COMPLEX,
   K.G.ROAD, BANGALORE 560 009.

3. **THE COMMISSIONER OF CUSTOMS,**
   CUSTOM HOUSE, COCHIN - 682 009,
   KERALA.

O.P. NO. 7403/2003:

4. THE DEPUTY COMMISSIONER OF CUSTOMS (IMPORTS) CUSTOM HOUSE, COCHIN - 9, KERALA.

BY ADV. SRI.P.PARAMESWARAN NAIR,ASST.S.G.

THIS ORIGINAL PETITION HAVING COME UP FOR ADMISSION ON 02/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B.RADHAKRISHNAN, J.

O.P.No.7403 OF 2003

Dated this the 2nd day of November, 2007

JUDGMENT

"C.R."

The petitioner was the managing director of a company, which had set up a unit in the Cochin Export Processing Zone for manufacture of certain equipments for cent percent export. On the basis of the relevant notifications, the company was entitled to import capital goods and claim benefit of duty exemption on proof of total export. With the passage of time, the business of the company fell and it went into liquidation.

2. In the mean while, the customs authorities issued a notice to show cause against confiscation, in terms of Section 111 (o) of the Customs Act, 1962, hereinafter referred to as 'the Act', and in terms of the bond executed by them and also against imposition of penalty, on the company and its directors under Section 112 of the Act. This was on the premise that the Assistant Commissioner of Customs had reported that neither

the capital goods nor the raw materials and other goods were used in the production of goods for export in terms of notification No.340/86 dated 13.6.1986 and in terms of the bond executed by the company.

3. By the impugned Ext.P1, an order of confiscation of the goods was issued invoking Section 111 (o) of the Act. No opportunity was extended to the directors of the company to redeem the goods, because, the Commissioner of Customs concluded that the directors did not show any interest in redeeming the goods on payment of fine and appropriate duty. However, stating no reasons whatsoever, the Commissioner also imposed a penalty of Rupees One Lakh on the writ petitioner, the Managing Director of the company, under Section 112 of the Act. On the premise that they were not actually involved in the management of the company, penalty was not imposed on the other directors.

4. Being aggrieved by the imposition of penalty, the petitioner carried an appeal before the Customs Excise & Gold (Control) Appellate Tribunal, South Zonal Bench. That has been dismissed as per the impugned Ext.P3 final order.

5. Before me, there is no serious challenge to the orders, in so far as they result in confiscation. However, the learned counsel for the petitioner argued that imposition of penalty under Section 112 of the Act by the Commissioner and the appellate decision confirming the same, have been made stating no reasons whatsoever and that, therefore, the impugned orders, to that extent, are cryptic. He further argued that the imposition of penalty under Section 112 of the Act referable to a situation under Section 111(o) could necessarily be only one that shall fall as a liability in terms of Section 112 (a) (ii). Dilating on the nature of that imposition, it was argued that in the absence of a positive finding of mens rea, the imposition of penalty on the Managing Director was clearly impermissible.

6. Examining the provisions of Section 111 and Section 112, it can be seen that any penalty referable to Section 111 (o) could be imposed under Section 112 only on the basis of clause (a) (ii) thereof, which states that any person who, in relation to any goods, does or omits to do any act, which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act, shall be liable in the case of dutiable goods, other than prohibited goods, to a penalty, not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is greater. The non observance of the conditions of import of the goods in question gives the jurisdiction to impose an order of confiscation in terms of Section 111 (o) of the Act. However, while considering the question as to whether penalty has to be imposed on any person for any commission or omission, which has rendered the goods liable for confiscation under Section 111 (o), it has to be decided as to whether the goods became liable for confiscation on account of any act of omission or commission attributable to the person in question. Merely because a person is the Managing

Director of a company, he would not be fastened with penalty, unless it is shown that he had, by his commissions or omissions, led the goods to be liable for confiscation.

7. The Commissioner, in Ext.P1 order, found that the writ petitioner was in control of the affairs of the company while the other directors were not. Taking that finding on its face value, when we move on to sub-clause (ii) of clause (a) of Section 112, the liability to penalty has to be determined on the basis of duties sought to be evaded. Therefore, the jurisdictional fact to impose a penalty in terms of Section 112 (a) (ii) includes the essential ingredient that "duty was sought to be evaded". Being a penal provision, it requires to be strictly construed. "Evade" means, to escape, slip away, to escape or avoid artfully, to shirk, to baffle, elude. (See Chambers Twentieth Century). The concept of evading involves a conscious exercise by the person who evades. To say that one has sought to evade, that person should be found to have tried to find way to evade or had aimed at evading, or had resorted to evading, for, "sought" is the past

tense and past participle of the word “seek”. Therefore, the process of “seeking to evade” essentially involves a mental element and the concept of the status “sought to be evaded” is arrived at only by a conscious attempt to evade. Considerable support to this view can be found in the decisions of the Apex Court in **Jain Exports Pvt. Ltd.** v. **Union of India** [1990 (47) E.L.T. 213 (S.C.)] and in **Akbar Badruddin Jiwani** v. **Collector** [1990 (43) E.L.T. 161 (S.C.)]. Therefore, the conclusion is inescapable that unless it is established that a person has, by his omissions or commissions, led to a situation where duty was sought to be evaded, there cannot be an imposition of penalty in terms of Section 112 (a) (ii) of the Act.

8. With the aforesaid in view, an examination of the impugned Exts.P1 and P3 orders would show that the imposition of penalty on the Managing Director of the company invoking Section 112 of the Act has been done without stating any reasons whatsoever; without entering a finding that the writ petitioner, as the Managing Director, is guilty of omissions or commissions

and had “sought to evade” duty. Neither the Commissioner nor the Appellate Tribunal had found against the version of the petitioner regarding the failure of business and that the international contracts with the Italian collaborators failed, leading the company to fall into liquidation. These factors clearly established that there was no ground to conclude that the situation in hand calls for an order against the Managing Director under Section 112 of the Act.

For the foregoing reasons, this writ petition is allowed quashing Exts.P1 and P3 in so far as it imposes penalty on the writ petitioner as the Managing Director of the company in question.

Sd/-

THOTTATHIL B.RADHAKRISHNAN,
Judge

kkb.

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THOTTATHIL B. RADHAKRISHNAN, J

O.P.NO.7403 OF 2003

JUDGMENT

2ND NOVEMBER, 2007.

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